86-1003

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS SALINAS, ET AL,
Petitioners

v.

ROADWAY EXPRESS, INC., ET AL,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' PETITION FOR CERTIORARI
BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

WHETHER ENTRY OF A CONSENT DECREE BY THE DISTRICT COURT WAS AN ABUSE OF DISCRETION.

WHETHER A CONSENT DECREE WHICH DEPRIVES LONG-TIME CITY TRUCK DRIVERS OF WORK EXPECTATION AS ROAD DRIVERS IS FAIR, JUST AND ADEQUATE.

CERTIFICATE OF INTERESTED PARTIES

Oscar W. Adams, Jr.
Eddie Andrews
Emmett Armstrong
Daniel Arthur
G. William Baab
R. Bertrand
H. Brown
Joe Bush
Joe Carroll
R. R. Carter
Allen Cooper, Jr.
Agapito De LaRosa
Edward Donnette
Eddie Doxie, Jr.
D. Duffie, Jr.
Willie Eckels
Estate of Lincoln Edwards
Arthur Egby, Jr.
Hal K. Gillespie
Z. Grimes
Hobart Haggerty
Webster Henderson
James L. Hicks
Holland Holt
Joe Hubbard
International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America
Harry James
Jefferson, Sherman & Mims
A. M. Johnson
Robert Kirby
Robert James Lewis
Willie L. Luckett
Wilbert Maltie
Frank Manitzas
Horace Mann
Roy Martinez
Marcus Melchor
Carnegie H. Mims, Jr.
Juvenita Molina
E. D. Monk
Frank Morales
Abel Mosley
Stuart M. Nelkin
Carl Owens
Herbert Perkins
James Perry
James Phipps
Sidney Ravkind
Roadway Express, Inc.
Lorenzo Robertson
Gilbert Romero
Thomas Salinas
Luis Segura
Charles Shelby
E. D. Smith
Bobby Stephens
Isaac Stewart
Ernest Gene Taylor
Arthur Gene Walker
W. D. Weber
Warren Weir
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A. C. Williams

LARRY Q. EVANS

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BRIEF FOR PETITIONERS

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit rendered its first opinion in this case on July 16, 1984. That opinion is reported at 735 F.2d 1574 (5th Cir. 1984). A second per curiam opinion was issued by the United States Court of Appeals for the Fifth Circuit on October 17, 1986. That opinion is reported at 802 F.2d 787 (5th Cir. 1986).

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 17, 1986. Rehearing was not sought. No cross-petition for Writ of Certiorari has been filed. Jurisdiction to review the judgment by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1) (1966 and Supp. 1984).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 28 U.S.C. § 1254(1) which provides:

   Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

   (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. 28 U.S.C. § 1291 which provides:

   "The Courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

3. 28 U.S.C. § 1343(4) which provides:

   The districts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

4. 28 U.S.C. Rule 23(e) which provides:

   A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to

all members of the class in such manner as the court directs.

5. 28 U.S.C. Rule 52(a) which provides:

In all actions tried upon the facts without a jury or with an advisory jury the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of facts and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

6. 42 U.S.C. § 1981 which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

7. 42 U.S.C. § 2000e-2(a)(1) and (2) which provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

8. 42 U.S.C. § 2000e-2(c)(1) and (2) which provides:

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This class action Title VII lawsuit was brought for racial and national origin discrimination in the terms and conditions of employment in the trucking industry.

The Petitioners are blacks, Mexican Americans and Spanish-surnamed Americans and/or their heirs, estates or designated guardians, who are city drivers for Roadway Express, Inc., at any time between November 1, 1968 and June 2, 1975, at locations within the Territory covered by the Southern Conference Teamsters Supplemental agreement to the National Master Freight Agreement, excluding the City of Atlanta, Georgia.

On September 17, 1971, this action was commenced in the Western District of Texas against Roadway and the Defendant unions. Specifically, the plaintiffs alleged that Roadway and the union defendants maintained separate seniority systems in collective bargaining for city and road drivers which discriminated against them because of their race and national origin. On November 6, 1974, the Judicial Panel on Multi-District Litigation ordered that this action be consolidated with other similarly pending class actions against Roadway and the union defendants.

The trial of this action was commenced on April 18, 1977. At the conclusion of the plaintiffs' evidence, the trial court found that the plaintiffs had demonstrated a prima facie case of employment discrimination with regard to the transfer of employment of black and Mexican-American city drivers into road-driver positions.

On November 19, 1981, the trial court entered findings of facts and conclusions of law and a judgment. Follow-

ing entry of judgment, notices of appeal were filed by the plaintiffs' class, certain of the individually named plaintiffs, members of the plaintiffs' class and the defendant Roadday. On July 16, 1984, the Fifth Circuit Court of Appeals vacated the judgment of the trial court and remanded the case. *Salinas, et al. v. Roadway Express, Inc., et al.*, 735 F.2d 1574 (5th Cir. 1984).

On remand, counsel for the parties conferred for the purpose of exploring settlement. On April 12, 1985, the trial court granted preliminary approval of a proposed consent decree.

After a fairness hearing on September 20, 1985, the trial court entered an order approving the consent decree on November 4, 1985, and made findings of fact and conclusions of law.

The Petitioners again appealed to the United States Court of Appeals for the Fifth Circuit. On October 17, 1986, the Fifth Circuit affirmed the district court's order entering the decree. *Salinas v. Roadway Express, Inc.*, 802 F.2d 787 (5th Cir. 1986).

The basis of jurisdiction in the United States District Court for the Western District of Texas was 28 U.S.C. § 1343(4). The basis of jurisdiction in the United States Court of Appeals for the Fifth Circuit was 28 U.S.C. § 1291.

ARGUMENT

Petitioners agree that the six-part test in *Parker v. Anderson*, 667 F.2d 1204 at 1209 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982), is controlling. The Petitioners allege, *Parker* notwithstanding, that the consent

decree, when taken as a whole, is not fair, just nor adequate. The Petitioners further allege that the terms and conditions embodied in the consent decree are such a radical departure from the intent and purpose of Title VII of the Civil Rights Act of 1964 as to merit this court's direction and supervision.

It has long been the accepted view that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs v. Duke Power Company,* 401 U.S. 432, 91 S. Ct. 849 (1971). If the consequence of the adoption of the consent decree is looked at as opposed to the motivation, one must seriously question what the net result or gain is to the Petitioners.

Here we have black and Spanish-surnamed individuals who worked as city truck drivers for the defendant. They were prohibited from applying for the higher-paying more lucrative road driver jobs. Now, after fifteen years of litigation, a consent decree is entered which says to them that they can now be listed on the seniority board, but with the same seniority date as a new hire. The Petitioners allege that although such a result naturally flows from the initial holding in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S. Ct. 1843 (1977), which holds dual seniority systems bona fide, the Petitioners allege that the result of such a following is *devastating* upon them. They, through no act or omission of their own, find themselves having been discriminated against and in so finding also discover that the discrimination will continue for literally the rest of their lives. They will never have the opportunity to work as road drivers. This consequence was eloquently spoken

to by Mr. Justice Marshall in his dissent to *International Brotherhood of Teamsters v. United States* at 431 U.S. 388, 97 S. Ct. 1843 (1977), and is quoted as follows:

> "The Court holds, in essence, that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions. Even those willing to pay the price will have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.
>
> I am aware of nothing in the legislative history of the 1964 Civil Rights Act to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority-group employees. Nor can I believe that the Congress that enacted Title VII would have agreed to postpone for one generation the achievement of economic equality."

Most of the Petitioners, who have dedicated the majority of their working lives to working as city drivers for the Defendant, now, in the twilight of their careers, have their legitimate expectation that their civil rights would genuinely be vindicated dashed against the rocks of despair and hopelessness and the door of true economic equality forever closed in their faces. Petitioners allege that such was not the intent of Congress in the passage of Title VII and genuinely feel that it was not the intent of this court in its holding in *International Brotherhood*

of Teamsters v. United States. The Petitioners respectfully urge this court to rethink its holding in *International Brotherhood of Teamsters v. United States,* with a view particularly toward the consequences of the holding. If the consequences of the holding are to continue to perpetuate segregation in the Defendants' workforce, then it clearly goes against the intent of Title VII as well as the moral imperative of true economical equality. Petitioners argue that such a consequence, regardless of the motivation, is not fair, just, nor adequate.

In its judgment and findings of fact and conclusions of law entered November 19, 1981, the trial court found that Roadway ceased its unlawful activity on January 1, 1968. Therefore, January 1, 1968, was established as the cut-off date for class membership. The United States Court of Appeals for the Fifth Circuit expressed its concern regarding this finding of fact as follows in *Salinas v. Roadway Express, Inc.,* 735 F.2d 1574 (5th Cir. 1984):

> The court's finding that Roadway ceased its unlawful activity on January 1, 1968, raises cause for concern in that it appears to be contradicted by other findings by the court. For instance, the court found that Roadway never employed a black road driver in the Southern Conference until May 5, 1969, and that no Mexican-American was employed in that position until March 11, 1972. Other of the court's findings also indicate that minorities were dissuaded from applying for road driving positions at least through May 1971. The reason that January 1, 1968, was selected as the cut-off date for class membership cannot be discerned from the district court's findings of fact and conclusions of law. Plaintiffs note that at a hearing on the court's pro-

> posed judgment, the trial judge indicated that he chose that date because class member Willie Luckett received a road driver application on that date in response to a letter that he had written to Roadway. *See* Record Vol. XII at 34-35. In its findings of fact, however, the court found that Luckett did not receive a letter from Roadway detailing the procedure for applying for a road job until March 19, 1971. Even more confusing is the fact that the court granted retroactive seniority to three class members who became city drivers after January 1, 1968. It should also be noted that, in their proposed notices to class members, both Roadway and the Plaintiffs recited that the class included minority employees who did or were doing city driving from November 1, 1968, until the time of suit.
>
> This Court reviews the district court's findings under the clearly erroneous standard. In doing so, we cannot be left to speculate as to the factual basis for the district court's conclusion. This Court cannot determine whether the district court's selection of the January 1, 1968, cut-off date was clearly erroneous when the district court has made no more than conclusory findings. We must therefore vacate the judgment of the district court for failure to comply with Fed. R. Civ. P. 52(a) and remand for findings which indicate, with specificity, the factual basis for the district court's determination of the cut-off date for class membership.

Thereafter, the same cut-off date leaps mysteriously from a position of having a speculative factual basis to prominence again in the form of findings of fact numbers sixty-two (62) and sixty-three (63), in the trial court's findings of fact and conclusions of law of November 4, 1985 which underpin and support the complained of Consent Decree.

The January 1, 1968 cut-off date is important not only because it determines class membership, but also determines the number of road driver vacancies. Therefore, if the trial court found that there were but six vacancies between the effective date of the Act and January 1, 1968, any finding that discriminatory conduct on the part of the Defendants continued past January 1, 1968 (1) enlarges the number of members in the class and (2) increases the number of vacancies available during the relevant time period. Since the January 1, 1968 date was substantially contradicted at trial, sufficiently to cause the United States Court of Appeals for the Fifth Circuit to remand with the instruction that the district court provide specific factual findings in support of the conclusion, it is inconceivable to the Petitioners that the very same conclusion can be allowed to stand based upon the very same deficient factual finding and in the face of the very same contradictions of record.

The total amount of backpay was also a function of the number of vacancies the district court found. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1055-56 (5th Cir. 1975). Furthermore, the finding of January 1, 1968 as the cut-off date for class membership and the number of vacancies is critical because it also determines in the consent decree which individuals would be afforded specific relief. The consent decree at page 23 enumerates those individuals whose claims were of greater value by reason of the fact that they had been previously recognized by the trial court as being entitled to relief. Such recognition was based upon the awarding of retroactive seniority and backpay corresponding to the vacancies occurring between the effective date of the Act and January 1, 1968. Again, if January 1, 1968 were determined

not to be the cut-off date and Petitioners allege that there is ample evidence in the record to so find, the number of vacancies during the relevant period significantly increases as does the number of individuals who should be afforded specific relief.

Because the finding that discrimination ceased on January 1, 1968 in the Defendants' workforce was clearly erroneous at the time of the Fifth Circuit's remand, it is equally clearly erroneous within the context of the consent decree. For this reason, the Petitioners allege that this finding, which underpins the basic consequences of the decree, is not fair, just, nor adequate.

Finally, with regard to the questions raised by *United Airlines, Inc. v. Evans,* 431 U.S. 553, 97 S. Ct. 1885 (1977), it is important to note that the importance of *Evans* is tied directly to the finding of January 1, 1968 as the date that discrimination ended in the Defendants' workforce. Apparently the basis for the trial court's determination of January 1, 1968, was the facts that the first black road driver was hired on or about May 5, 1969, and the first Mexican-American road driver was hired on or about March 11, 1972. However, it is well settled that the hiring of a single black or Spanish-surnamed individual does not signify the end of a discriminatory practice. *Swint v. Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976), reversed on other grounds, 456 U.S. 273 (1982). Therefore, Petitioners allege that once the clearly erroneous cut-off date of January 1, 1968 is discredited, and a more just, fair and adequate date established by the preponderance of credible, believable evidence, the *Evans* question does not loom nearly so ominously.

As this court has previously noted in *Franks v. Bowman Transportation Company*, 42 U.S. 747, 96 S. Ct. 1251, 47 L.Ed.2d 444 (1976), the critical importance of seniority in the trucking industry is that:

> It determines the order of layoff and recall of employees. Further, job assignments for [over the road] drivers are posted for competitive bidding and seniority is used to determine the highest bidder. As [over the road] drivers are paid on a per mile basis, earnings are therefore to some extent a function of seniority.

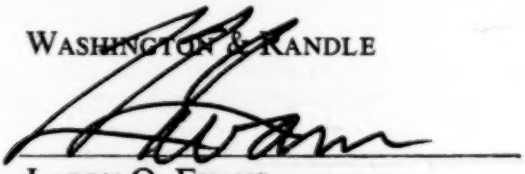
CONCLUSION

Given the critical importance of seniority in the trucking industry, the Petitioners respectfully urge the court to grant this Petition for Writ of Certiorari. This lawsuit represents one of the final chapters in the history of the attempt to desegregate employment in the motor freight industry in the United States. Unfortunately, the consequences of the line of decisions that bring us here have greatly outweighed the motivation. The Petitioners respectfully request this Court to take a long and careful look at those consequences. They will indeed have a far reaching and long range impact upon race relations

and equality among all citizens, particularly those involved in the trucking industry, for generations to come.

Respectfully submitted,

WASHINGTON & RANDLE

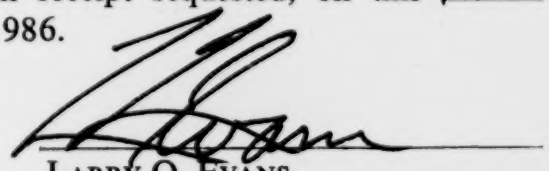
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CERTIFICATE OF SERVICE

By my signature below, I do hereby certify that on the 17th day of December, 1986, a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by United States mail to the following: STUART M. NELKIN, at Nelkin & Nelkin, 5417 Chaucer, Houston, Texas 77005; OSCAR W. ADAMS, III, 729 Brown Barx Building, 2000 First Avenue North, Birmingham, Alabama 35203; WARREN WEIR, at Weir & Alvarado, 115 Cameron, San Antonio, Texas 78205; SIDNEY RAVKIND, at Mandell & Wright, 1901 First National Life Building, Houston, Texas 77002; JAMES L. HICKS, JR., at Hicks, Gillespie, James & Lesser, P.C., P. O. Box 472227, Dallas, Texas 75247; SHELTON E. PADGETT, at Manitzas, Harris & Padgett, 1200 South Texas Building, San Antonio, Texas 78205; CARNEGIE H. MIMS, JR., at 707 Central National Bank Building, 2100 Travis Street, Houston, Texas 77002; and G. WILLIAM BAAB, at Mullinax, Wells & Baab, 8402 Elmbrook, Suite 200, Dallas, Texas 75247, each by certified mail, return receipt requested, on this 17th day of December, 1986.



LARRY Q. EVANS